DAVID GRANT & CO. PTY LIMITED

v.

WESTPAC BANKING CORPORATION

HIGH COURT OF AUSTRALIA, ADELAIDE
BRENNAN CJ, DAWSON, GAUDRON, MCHUGH & GUMMOW JJ
[MATTER NOS. M38, M39 & M40 OF 1995]
11 OCTOBER 1995

COMPANY LAW: *Insolvency - Winding-up by the Court - Statutory demand of creditor - Application to set aside - Time within which the application to be made - Whether mandatory or may be extended - Sections 459E, 459F, 459G & 1322 Corporations Law (Aust).*

STATUTORY INTERPRETATION: *Construction of two provisions in the statute - Earlier section of general application - Later section specific in its operation - Whether specific section excludes operation of general expressions - Sections 459G & 1322 Corporations Law (Aust).*

The appellants are three companies within the same group, incorporated in the State of Victoria. On 4 July 1994 the respondent served statutory demands on the appellants under s. 459E Corporations Law for the payment of debts owed by the appellants. On 26 July 1994, the appellants filed and served applications under s. 459G to set aside those demands. Filing and service of the applications occurred after the expiration of the 21 day period referred to in s. 459G. Briefly, s. 459E provided for the service by the creditor of a statutory demand on the company. Failure by the company to comply with the demand within 21 days may found an application that the company be wound up in insolvency. However, if the company applies in accordance with s. 459G for an order setting aside the demand, the applicable period for compliance would either be the period extended by the Court on application of the company or the period beginning on the day when the demand is served and ending 7 days after the application under s. 459G is finally determined. Section 459G(2) stipulates that the application to set aside a statutory demand "may only be made within 21 days after the demand is so served".

Section 1322(4)(d) provided that the Court may, on application of any interested person, make an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under the Act or in relation to a corporation, including an order extending a period where the period in question ended before the application was made. Sections 459E, 459F and 459G were the result of an amendment inserted into the Corporation Law and which commenced on 23 June 1993.

The appellant's said applications were dismissed by the Supreme Court of Victoria and by the Appeal Division. On appeal to the High Court of Australia the following issues arose:

(i) the construction of s. 1322(4) in relation to s. 459G where the general s. 1322 preceded the specific s. 459G; and

(ii) whether s. 1322(4) empowers a Court to extend time within which a company can file an application under s. 459G to set aside a statutory demand.

Held:

Per Gummow J (Brennan CJ, Dawson, Gaudron & Mc Hugh JJ concurring):

[1] Section 1322(d) confers upon the Court a broad authority to extend the period for the taking of any step under the statute or any step in relation to a corporation. Generally, it is inappropriate to read provisions which confer jurisdiction or grant powers to a Court by the making of implications or imposition of limitations not found in the express words of the legislative provision. Here, however, by a later and more specific provision inserted into the Corporation Law by the 1992 Act, provision is made for a particular class of application and there is attached a specific limitation as to time within which an application may be made. The imposition of such a restraint is consistent with the scheme of the 1992 Act.

[2] The temporal requirements of s. 459G operate to define the jurisdiction of the Court in respect of an application to set aside a statutory demand. In providing that an application for an order setting aside a statutory demand "may only" be made within the 21 day period therein specified and providing for the mode of application, a limitation or condition is attached upon the authority of the Court to set aside the demand. The use of the term "may" does not give rise to the considerations which apply where legislation confers upon a decision-maker an authority of a discretionary kind.

[3] The phrase "an application may only be made within 21 days" should be read as a whole. The force of the term "may only" is to define the jurisdiction of the Court by imposing a time requirement as an essential condition of the new right conferred by s. 459G. To treat s. 1322 as authorising the Court to extend the period of 21 days specified in s. 459G would deprive the word "only" of effect. Therefore the requirement in s. 459G that the application to the Court to set aside the demand be made only within 21 days after service should not be treated as supplemented or qualified by the operation of s. 1322(4).

Obiter dictum:

No doubt in some circumstances, the new provisions (inserted by the 1992 Act) may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with the perceived defects in the pre-existing procedure in relation to notices of demand. It may also transpire that a winding-up application in respect of a solvent company is threatened or made for an improper purpose which amounts to abuse of process but injunctive relief may then be available to the company.

[Appeals dismissed].

Cases referred to:

Sydar v. K Simmonds Finance [1995] 16 ACSR 384 ***(refd)***
Texel v Commonwealth Bank [1994] 2 VR 298 ***(refd)***
Australian Securities Commission v. Marlborough Gold Mines Ltd [1993] 177 CLR 485 ***(refd)***
Re J & E Holdings Pty Ltd [1995] 17 ACSR 319 ***(refd)***
Owners of "Shin Kobe Maru" v. Empire Shipping Co Inc [1994] 181 CLR 404 ***(refd)***
Anthony Hordern & Sons Ltd v. Amalgamated Clothing and Allied Trades Union of Australia, [1932] 47 CLR 1 ***(refd)***
R v. Wallis [1949] 78 CLR 529 ***(refd)***
Saraswati v. The Queen [1991] 172 CLR 1 ***(refd)***
Downey v. Trans Waste Pty Ltd. [1991] 172 CLR 167 ***(refd)***

Acton Engineering Pty Ltd. v. Campbell [1991] 31 FCR 1 ***(refd)***
Pancontinental Mining Ltd. v. Burns [1994] 124 ALR 471 ***(refd)***
Ward v. Williams [1955] 92 CLR 496 ***(refd)***
Commissioner of State Revenue (Vict) v. Royal Insurance Australia Ltd [1994] 182 CLR 51 ***(refd)***
The Crown v. McNeil [1922] 31 CLR 76 ***(refd)***
*Australian Iron & Steel Ltd. v. Hoogland [1962] 108 CLR 471****(refd)***
Cavetina v. Synthetic Dyeworks [1994] 14 ACSR 274 ***(overd)***
Williams v. Spautz [1992] 174 CLR 509 ***(refd)***
Bryanston Finance v. de Vries (No. 2) [1976] Ch 63 ***(refd)***
L & D Audio Acoustics Pty Ltd. v. Pioneer Electronic [1982] 7 ACLR 180 ***(refd)***
Pacific Communication Rentals Pty Ltd. v. Walker [1993] 12 ACSR 287 ***(refd)***

Legislation referred to:

Corporate Law Reform Act 1992, ss. 57, 58, 459(2), 459A-459T, 460(2), 461-464, 465A-489, 490-512, 513-581
Corporations Law, ss. 70, 467A, 1322
Corporations (Victoria) Act 1990 (Vic), s. 42

Other sources referred to:

General Insolvency Inquiry, Law Reform Commission Report No. 45
"*Statutory Demands - Extending the Time to Apply to Set Aside*", Keay, [1994] 2 Insolvency Law Journal 162
"*Extending the Time in Which to Apply to Set Aside Statutory Demands: The Plot Thickens*" [1995] 3 Insolvency Law Journal 60

For the appellants - W.J. Martin, QC (N. Pane with him); M/s. David M. Townshend
For the respondent - A.C. Archibald, QC (P.J. Cosgrave with him); M/s. Dunhill Madden Butler
For the intervener - Peter John Stepek, Australian Securities Commission

JUDGMENT

Gummow J:

These three appeals from the Supreme Court of Victoria (Appeal Division) were heard together, as they had been in the Supreme Court ([1995] 15 ACSR 771; 13 ACLC 261.) They raise a short but important issue of construction of the Corporations Law ("the Law").

At the conclusion of the hearing in this Court, the Court announced that the appeals were to be dismissed for reasons to be given later. What follows are those reasons. Chapter 5 of the Law is headed "External Administration". Section 57 of the Corporate Law Reform Act 1992 (Cth) ("the 1992 Act") inserted in Ch 5 a new Pt 5.4 (ss. 459A-459T) headed "Winding Up in Insolvency". Part 5.4A (ss. 461-464) is headed "Winding Up by the Court on Other Grounds" and Pt 5.4B (ss. 465A-489) is headed "Winding Up in Insolvency or by the Court". Voluntary winding up is dealt with in Pt 5.5 (ss. 490-512) and provisions dealing with winding up generally are found in Pt 5.6 (ss. 513-581).

Section 58 of the 1992 Act repealed s. 460 of the Law. This had provided that the Court might order the winding up of a company that was unable to pay its debts and that the company would be deemed to be unable to do so if, as stated in para. (a) of s. 460(2):

> a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring the company to pay the sum so due and the company has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

In the Explanatory Memorandum published at the time of the introduction into the Parliament of the Bill for the 1992 Act, reference was made to the Law Reform Commission Report No. 45, *General Insolvency Inquiry* (the "Harmer Report"), when dealing with what became Div 3 of Pt 5.4 (ss. 459G-459N). Paragraphs 685, 688, 689 and 690 of the Explanatory Memorandum were as follows:

> Division 3 - Application to set aside statutory demand
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> 685. This Division will implement the Harmer Report's recommendations in connection with the setting aside of statutory demands. The Harmer Report considered that the existing, largely unregulated, procedure in relation to notices of demand too often produces disputes about the debt at the hearing of a winding up application. The report further noted that companies presently often need to bring injunction proceedings where a debt claimed in a demand is disputed. The report took the view that the legislation should specifically provide for the determination of disputed debt issues and other disputes in respect of a statutory demand.
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> ...
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> 688. The provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands, and to do so on the basis of the commercial justice of the matter, rather than on the basis of technical deficiencies. In particular it is intended to remove the present difficulties which are experienced where difficulties in estimating the extent of the debt may lead to an invalidating of the statutory demand on the basis of a minor overstatement of the amount due. ...
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> 689. This proposed Division, together with proposed Division 4 [ss. 459P-459T], also provides a means of dealing with statutory demand disputes in such a way that an alleged defect in the statutory demand does not have the effect of prolonging proceedings leading to the commencement of a winding up, by requiring debtor companies to raise genuine disputes (about, for example, whether a debt is owed) at an early stage, rather than after winding up proceedings have commenced.
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> Proposed s. 459G - Company may apply
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> 690. A company may apply to the Court for an order setting aside a statutory demand served on the company (proposed subsection (1)). The application may only be made within 21 days after the demand is served (proposed subsection (2)). For the application to be effective, an affidavit supporting the application must be filed with the Court within those 21 days, and a copy of the application and the supporting affidavit served on the person who originally served the demand on the company (proposed subsection (3)).

The provisions of the new Pt 5.4 constitute a legislative scheme for quick resolution of the issue of solvency and the determination of whether the company should be wound up without the interposition of disputes about debts, unless they are raised promptly. The salient features of the scheme, as they affect the present dispute, are as follows:

Section 459E provides for the service by a creditor of a statutory demand on a company. Failure by the company to comply with the demand within the period for compliance may found an application that the company be wound up in insolvency. If, during or after the three months ending on the day when the application is made, the company failed to comply with the demand, the Court must presume that the company is insolvent (s. 459C(2)(a)).

The period for compliance is stated in s. 459F(2)(b) as being 21 days after the demand is served. However, if the company applies in accordance with s. 459G for an order setting aside the demand, the applicable period is that specified in s. 459F(2)(a). Section 459G(2)

stipulates that an application for an order setting aside a statutory demand which has been served on the company "may only be made within 21 days after the demand is so served".

Paragraph (d) of s. 1322(4) of the Law, the enactment of which preceded the 1992 Act, provides that the Court may, on application by any interested person, make an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under the Law or in relation to a corporation, including an order extending a period where the period in question ended before the application was made for the order.

Section 57 of the 1992 Act, which inserted Pt 5.4, commenced on 23 June 1993. There have since been divergent views in various Courts as to whether s. 1322(4) of the Law empowers a Court to extend the time within which a company can file an application under s. 459G to set aside a statutory demand (A summary of the state of the authorities on 30 March 1995 is given in *Sydar v. K Simmonds Finance* [1995] 16 ACSR 384; 13 ACLC 480 at 490-497. Many of the authorities are collected and discussed in Keay, "*Statutory Demands - Extending the Time to Apply to Set Aside*", [1994] 2 Insolvency Law Journal 162 and "*Extending the Time in Which to Apply to Set Aside Statutory Demands: The Plot Thickens*"' [1995] 3 Insolvency Law Journal 60.) This divergence of opinion calls for resolution by this Court.

The facts of the present appeals are in short compass. The appellants are three companies within the same group. The companies were incorporated in the State of Victoria. On 4 July 1994, the respondent served statutory demands on the appellants. On 26 July 1994, the appellants filed and served applications under s. 459G to set aside those demands. Filing and service of the applications occurred after the expiration of the 21 day period referred to in s. 459G. In the Supreme Court of Victoria, the Senior Master dismissed the applications and appeals were dismissed by a justice (Hayne J) and by the Appeal Division.

In the Appeal Division two judgments were delivered, by Brooking and J D Phillips JJ, and by Smith J. In both judgments, their Honours indicated that, had the matter been an entirely open one, they would readily have accepted the view previously expressed by Hayne J in *Texel v. Commonwealth Bank* [1994] 2 VR 298 and reaffirmed in the instant proceedings. His Honour had held that s. 1322 had no application in relation to s. 459G. However, the Full Court was presented with the majority decision, to the contrary effect, of the *Queensland Court of Appeal in Cavetina v. Synthetic Dyeworks* [1994] 14 ACSR 274; 12 ACLC 768. In that case, Macrossan CJ and Demack J held that s. 459G should not be regarded as excluding the authority of the Court under s. 1322 to extend time for bringing applications to set aside statutory demands. McPherson JA dissented and reached the same view as Hayne J.

In the instant cases, the Appeal Division concluded that, despite what was identified as the stringency of the requirement expressed by this Court in *Australian Securities Commission v. Marlborough Gold Mines Ltd* [1993] 177 CLR 485 at 492 concerning consistency in the interpretation of uniform national legislation by intermediate appellate Courts, *Cavetina* should not be followed.

This Court granted special leave on 9 June 1995. On 15 June 1995, the New South Wales Court of Appeal in *Re J & E Holdings Pty Ltd* [1995] 17 ACSR 319; 13 ACLC 867. agreed with the interpretation which had been placed upon s. 459G by the Appeal Division. The judgment of the Court of Appeal was delivered by Sheller JA. His Honour concluded his judgment as follows ([1995] 17 ACSR 319 at 327; 13 ACLC 867 at 873-874):

> In the present case I agree with the interpretation placed upon s. 459G by the Appellate Division of the Victorian Supreme Court in *David Grant*. This is the latest decision by an intermediate appellate Court on the point. Their Honours carefully reviewed the arguments and concluded that the majority decision of the Queensland Court of Appeal was plainly wrong. Even if I retained some residual doubt about the Victorian Court's conclusion I think we should follow it. To do otherwise would seem to me to be giving but lip service to what the High Court has said. Certainty in the law, in my opinion, requires that only in an extreme case would an intermediate appellate Court or a Judge of first instance not follow the latest decision by an intermediate appellate Court if, in that latest decision, the arguments have been fully reviewed and a conclusion reached that an earlier decision of another intermediate appellate Court was plainly wrong.

It is appropriate now to refer further to the principal provisions of the Law which are relevant to the present case.

On an application under s. 459P, the Court may order that an insolvent company be wound up in insolvency (s. 459A). A creditor, including a secured creditor or a contingent or prospective creditor, may apply to the Court for a company to be wound up in insolvency (s. 459P(1)(b)). The application is to be determined within six months after it is made (s. 459R(1)). However, the Court may, with or without conditions, grant an order which extends the period within which the application must be determined. The Court may so order only if it is satisfied that special circumstances justify the extension and the order is made within the six month period or within the period as last extended. If not determined as required by s 459R, then, "because of this subsection", the application is dismissed (s. 459R(3)).

For the purposes of a winding up application under s. 459P, the Court "must presume" that the company is insolvent if, during or after three months ending on the day on which the application was made, "the company failed (as defined by s. 459F) to comply with a statutory demand" (s. 459C(2)(a)). The presumption for which s. 459C provides operates except so far as the contrary is proved for the purposes of the application (s. 459C(3)).

The statutory demand must be in writing, be signed by or on behalf of the creditor, and satisfy the other requirements of s. 459E(2). Unless the debt is a judgment debt, the demand must be accompanied by an affidavit verifying the debt and otherwise complying with s. 459E(3).

In so far as an application for a company to be wound up in insolvency relies on failure by the company to comply with a statutory demand, the company may not oppose the winding up application on a ground that the company relied on for the purposes of an application to set aside the demand. Nor may the company oppose the winding up application on a ground on which it could have so relied but did not, whether or not in fact it sought to set aside the demand (s. 459S(1)). It is true that, in these circumstances, the Court may grant leave to oppose the application on such a ground. Nevertheless, the Court must not grant such leave unless it is satisfied that the ground is material to proving that the company is solvent (s. 459S(2)).

The provisions of Pt 5.4 which are of crucial importance for these appeals are s. 459F and s. 459G. Section 459F states:

> (1) If, as at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail to comply with the demand at the end of that period.

(2) The period for compliance with a statutory demand is:

(a) if the company applies in accordance with s. 459G for an order setting aside the demand:

(i) if, on hearing the application under s. 459G, or on an application by the company under this paragraph, the Court makes an order that extends the period for compliance with the demand - the period specified in the order, or in the last such order, as the case requires, as the period for such compliance; or

(ii) otherwise - the period beginning on the day when the demand is served and ending 7 days after the application under s. 459G is finally determined or otherwise disposed of; or

(b) otherwise - 21 days after the demand is served.

Section 459G states:

(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

(a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

Section 459J provides that, on an application under s. 459G, the Court may, by order, set aside the demand (and may do so on conditions (s. 459M)). The Court may so act if it is satisfied that substantial injustice will be caused because of a defect in the demand unless the demand is set aside, or that there is some other reason why the demand should be set aside. However, s. 459J also requires the Court otherwise not to set aside a statutory demand merely because of a defect.

The appellants placed some reliance upon s. 1322(2). This provides that a proceeding under the Law is not invalidated "because of any procedural irregularity", unless the Court is of opinion that the irregularity has caused or may cause substantial injustice which cannot be remedied by any Court order, and unless the Court, by order, declares the proceeding to be invalid. In s. 1322(1), it is stipulated that a reference to a procedural irregularity includes a reference to "a defect, irregularity or deficiency of notice or time". However, in oral argument, Counsel for the appellants accepted that there was a real difficulty in characterising the facts as involving merely a procedural irregularity.

Counsel placed his primary submissions upon s. 1322(4), and in particular upon paras. (a) and (d). Section 1322(4), (5) and (6) should be set out in full:

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Law, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Law or in relation to a corporation is not invalid by reason of any contravention of a provision of this Law or a provision of the constitution of a corporation;

(b) an order directing the rectification of any register kept by the [(Australian Securities)] Commission under this Law;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Law or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

(5) An order may be made under paragraph 4(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) The Court shall not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is in the public interest that the order be made;

(b) in the case of an order referred to in paragraph (4)(c) - that the person subject to the civil liability concerned acted honestly; and

(c) in every case - that no substantial injustice has been or is likely to be caused to any person.

On the present appeals, the difficulty in construction arises, perhaps not so much from the particular text of either s. 459G or s. 1322, as from the interrelation between the two provisions in circumstances where the enactment of s. 1322 preceded that of s. 459G, and the earlier section is general and the later section specific in its operation.

Paragraph (a) of s. 1322(4) confers upon the Court a broad authority to declare that any proceeding purporting to have been instituted under the Law is not invalid by reason of any contravention of a provision of the Law. Again, para (d) confers upon the Court a broad authority to extend the period for the taking of any step under the Law or any step in relation to a corporation. As a general precept, it is inappropriate to read provisions which confer jurisdiction or grant powers to a Court by the making of implications or imposition of limitations not found in the express words of the legislative provision. (*Owners of "Shin Kobe Maru" v. Empire Shipping Co Inc* [1994] 181 CLR404 at 421.) Here, however, by a later and more specific provision inserted in the Law by the 1992 Act, provision is made

with respect to a particular class of application and there is attached a specific limitation as to the time within which an application may be made. The imposition of such a restriction is consistent with the scheme of the 1992 Act.

In *Anthony Hordern & Sons Ltd v. Amalgamated Clothing and Allied Trades Union of Australia* [1932] 47 CLR 1 at 7, Gavan Duffy CJ and Dixon J said:

> When the legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

McTiernan J ([1932] 47 CLR 1 at 20-21) spoke to the same effect. This reasoning has been applied in subsequent decisions of this Court (see *R v. Wallis* [1949] 78 CLR 529 at 550; *Saraswati v. The Queen* [1991] 172 CLR 1 at 23-25; *Downey v. Trans Waste Pty Ltd* [1991] 172 CLR 167 at 171-172, 180-182).

In addition, the temporal requirements in sub-ss (2) and (3) of s. 459G operate to define the jurisdiction of the Court in respect of an application to set aside a statutory demand. Before developing this point, reference first should be made to the source and nature of the jurisdiction involved.

The Law and the Corporations Acts of the States and Territories establish their own system of vesting and cross-vesting of jurisdiction. An analysis of this aspect of the legislation is provided in *Acton Engineering Pty Ltd v. Campbell* [1991] 31 FCR 1 at 8-17. See also *Pancontinental Mining Ltd v. Burns* [1994] 124 ALR 471 at 479-481, 485). For the purposes of these appeals, it is sufficient to note that s. 42 of the Corporations (Victoria) Act 1990 (Vic) confers jurisdiction on the Supreme Court of Victoria with respect to "civil matters" arising under the Corporations Law of Victoria. An application under s. 1322 would be one such matter and an application under s. 459G would be another.

In providing that an application to the Court for an order setting aside a statutory demand "may only" be made within the 21 day period there specified and that an application is made in accordance with s. 459G only if, within those 21 days, a supporting affidavit is filed and a copy thereof and of the applications are served, sub-ss (2) and (3) of s. 459G attach a limitation or condition upon the authority of the Court to set aside the demand. In this setting, the use in s. 459G(2) of the term "may" does not give rise to the considerations which apply where legislation confers upon a decision-maker an authority of a discretionary kind and the issue is whether "may" is used in a facultative and permissive sense or an imperative sense (*Ward v. Williams* [1955] 92 CLR 496 at 505-506; *Commissioner of State Revenue (Vict) v. Royal Insurance Australia Ltd* [1994] 182 CLR 51 at 63, 84-85, 97-98). Here, the phrase "[a]n application may only be made within 21 days" should be read as a whole. The force of the term "may only" is to define the jurisdiction of the Court by imposing a requirement as to time as an essential condition of the new right conferred by s. 459G. An integer or element of the right created by s. 459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in *The Crown v. McNeil* [1922] 31 CLR 76 at 100-101. See also [1922] 31 CLR 76 at 96 per Knox CJ and Starke L and *Australia Iron & Steel Ltd v. Hoogland* [1962] 108 CLR 471 at 488-489 per Windeyer J), it is a condition of the gift in sub-s (1) of s. 459G that sub-s (2) be observed and, unless this is so, the gift can never take effect. The same is true of sub-s (3).

This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word "only" in s. 459G(2) if it does not mean what it says, which is that the application is to be made within 21 days of service of the demand, and not at some time thereafter and that to treat s. 1322 as authorising the Court to extend the period of 21 days specified in s. 459G would deprive the word "only" of its effect (*Cavetina v. Synthetic Dyeworks* [1994] 14 ACSR 274 at 281; 12 ACLC 768 at 774; *Re J & E Holdings Pty Ltd* [1995] 17 ACSR 319 at 325; 13 ACLC 867 at 872).

Further, it is significant that the scheme established by the new Pt 5.4. itself contains specific provisions conferring upon the Court an express power to extend time. First, the Court may make an order extending the period for compliance with the statutory demand. If the company applies "in accordance with s. 459G" to set aside the demand, then an order extending the time for compliance may be made. The order may be made either on the hearing of the application under s. 459G or on an application by the company under para. (a) of s. 459F(2). Such an extension may itself be extended on further application (para. (a)).

Secondly, in the circumstances specified in sub-s (2) of s. 459R, the Court may extend the six month period within which there is to be determined an application for winding up in insolvency. That period may be further extended by subsequent order (para. (b) of s. 459R(2)).

In addition, the question whether s. 459G is supplemented by a power to extend the time for making an application thereunder should be considered in the light of the consequences upon the presumption of insolvency under s. 459C(2). That presumption is an important element of the scheme of Pt 5.4.

Section 459C(2) requires the Court to presume that the company is insolvent if, during or after the three months ending on the day when the application for winding up in insolvency is made, any of the circumstances specified in paras. (a) - (f) apply. Paragraph (a) applies where the company failed to comply with the statutory demand. The paragraph uses the expression "failed (as *defined* by s. 459F) to comply" (emphasis added). In turn, s. 459F details the circumstances in which the company is taken to fail to comply, and does so in terms which speak only of an application to set aside the demand "in accordance with s. 459G".

The text of s. 459F is set out earlier in these reasons. The effect of s. 459F is that the company is taken to fail to comply if, at the end of the period for compliance, the demand is still in effect and the company has not complied with it. The term "period for compliance" is defined in paras. (a) and (b) of s. 459F(2). On the one hand, that period is 21 days after the demand is served (para. (b)). On the other hand, if an order has been sought setting aside the demand, the period may be a longer one, as detailed in sub-paras. (i) and (ii) of para. (a). However, this will only be so if, in the terms of para. (a), the company itself "applies in accordance with section 459G".

These matters emphasise the importance of s. 459G as an integral part of the particular scheme established by Pt 5.4. Paragraph (d) of s. 1322(4) empowers the Court to make an order where the period concerned ended before the application to extend it is made. An application to set aside the demand made not within the 21 days specified in s. 459G but within another period allowed pursuant to an order under s. 1322(4), could not modify what otherwise would be the operation of the definition of the "period for compliance" with the statutory demand set out in s. 459F(2). That in turn would not change the answer to the question posed under

s. 459C(2) as to whether the Court must presume the company to be insolvent because it had, within the period there specified, failed "as defined by s. 459F" to comply with the statutory demand.

For these reasons, the requirement in s. 459G that the application to the Court for which it provides be made only within 21 days after service of the demand should not be treated as supplemented or qualified by the operation of s. 1322(4).

These reasons lead also to the rejection of the reliance by the appellants upon ss. 70 and 467A of the Law. Section 70 provides that, where the Law "confers power to extend the period for doing an act", an application for the exercise of the power may be made and it may be exercised even if the period has ended. However, the Law does not confer a power to extend the period within which an application may be made under s. 459G.

Section 467A provides that an application under Pt 5.4 "must not be dismissed" merely because of "a defect or irregularity in connection with the application", unless the Court is satisfied that substantial injustice has been caused and this cannot otherwise be remedied. However, s. 467A cannot assist the appellants. If an application for an order setting aside a statutory demand has not been made within 21 days after service of the demand, there is no application under Pt 5.4 before the Court. Therefore, there is no question of such an application being dismissed because of a defect or irregularity in connection with it. In *Re J & E Holdings Pty Ltd* [1995] 17 ACSR 319 at 327; 13 ACLC 867 at 873). Sheller JA summed the matter up as follows:

> The position is quite simply that unless the Court has a power to extend the time within which the application to set aside the statutory demand can be made, the plaintiff has no right to make it.

Sheller JA also referred ([1995] 17 ACSR 319 at 324-325; 13 ACLC 867 at 871). to various examples where it might be thought that, upon the construction he preferred, which I also have accepted, Pt 5.4 might operate harshly. In particular, reference was made to the drastic commercial consequences which may follow the issue of process for winding up and to the inability of a company, which for good reasons had been late in filing or serving an application to set aside the statutory demand, to prevent the issue of that winding up process. The damage to the commercial reputation of the company in the meantime might not be answered by the eventual success of the company in defeating the application to wind it up as insolvent. Further, default clauses in securities given by the company may have been so drawn as not to take full account of the new statutory scheme, with the consequence that floating charges may have crystallised and the whole of the principal and interest become payable.

No doubt, in some circumstances, the new Pt 5.4 may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with perceived defects in the pre-existing procedure in relation to notices of demand. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in *Williams v. Spautz* [1992] 174 CLR 509 at 518-522, 532-537. However, in an appropriate case, injunctive relief may then be available to the company in a Court of general equity jurisdiction (*Bryanston Finance v. de Vries* (No2) [1976] Ch 63 at 78, 79-80; *L & D Audio Acoustics Pty Ltd v. Pioneer Electronic Australia Pty. Ltd.* [1982] 7 ACLR 180 at 183; 1 ACLC 536 at 538, *Pacific Communication Rentals Pty Ltd v. Walker* [1993] 12 ACSR 287

at 289; 12 ACLC 5 at 6-7; *Re J & E Holdings Pty Ltd.* [1995] 17 ACSR 319 at 324; 13 ACLC 867 at 871).

For these reasons, the appeals have been dismissed. The appellants must pay the costs of the respondent.